

well as its own affiliated electronic publishers, in random order, to the customer. Implementation of this requirement is subject to OMB approval as prescribed by the Paperwork Reduction Act.

VII. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Meaning of "Control" and "Financial Interest"

242. We concluded above, in Part III.A, that a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls, or has a financial interest in, the content of the information being disseminated over its basic telephone services. The record compiled in this proceeding, however, does not provide sufficient detail for us to determine the meaning of "control" and "financial interest" in this context. By clarifying these terms, we believe we will be in a better position to determine when, and under what circumstances, a BOC's participation in a service constitutes BOC provision of electronic publishing service subject to the requirements of section 274.

1. Meaning of "Control"

243. The term "control" in section 274(i)(4) is defined according to regulations promulgated by the Securities and Exchange Commission implementing the Securities Exchange Act of 1934. As defined thereunder, the term "control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."⁵⁵⁵ We tentatively conclude that this definition, which defines the term "control" in a corporate context, is inappropriate for determining the meaning of "control" in the present context, *i.e.*, when a BOC has "control" of the content of information transmitted via its basic telephone service. We therefore seek comment on how we should determine whether a BOC has "control" of the content of the information being disseminated under section 274.

244. For example, we seek comment on whether an ownership interest is required for a BOC to have "control" of the content of the information. If so, we seek comment on the percentage of ownership interest necessary for the BOC to be deemed to be in "control" of the content of the information. Alternatively, we seek comment on whether "control" should be broadly interpreted to include the ability of a BOC, when acting as a gateway provider, to limit the types of information to which its gateway connects. NYNEX suggests that this ability does not imply the type of "control" over the underlying information being transmitted and, therefore, does not constitute electronic publishing.⁵⁵⁶ We seek comment on this interpretation.

⁵⁵⁵ See 47 U.S.C. § 274(i)(4), which incorporates by reference 17 C.F.R. § 240.12b-2.

⁵⁵⁶ NYNEX at 7.

2. Meaning of "Financial Interest"

245. We also seek comment on the meaning of the term "financial interest." We tentatively conclude that a BOC has a "financial interest" in the content of the information when the BOC owns the information or has a direct or indirect equity interest in the information being disseminated via its basic telephone services. We seek comment on this tentative conclusion. We also seek comment on other forms of BOC participation that should be considered indicia of "financial interest." For example, NYNEX maintains that a "financial interest" in the content of the information should not be interpreted to include receipt of compensation by a BOC for managing and presenting the content of unaffiliated entities as part of its gateway services. Alternatively, PacTel contends that a "financial interest" must be a legally protected property interest." We seek comment on these interpretations.

246. In addition, we seek comment on whether we should establish a *de minimis* exception to the financial interest requirement once financial interest has been established. For example, if a BOC has a financial interest in only one percent of the content of the information, should it be required to provide the electronic publishing service through a "separated affiliate" or "electronic publishing joint venture"? If not, should the BOC be required to do so if it has a financial interest of ten percent? We seek comment on the percentage of financial interest in an electronic publishing service, as defined in section 274(h), that makes a BOC subject to the requirements of section 274.

B. Meaning of "Transaction" in Section 274(b)(3) and the Requirements of Section 274(b)(3)(B)

247. Section 274(b)(3) provides that a separated affiliate or electronic publishing joint venture established pursuant to section 274(a) and the BOC with which it is affiliated shall "carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in a manner that is auditable in accordance with generally accepted accounting standards."⁵⁵⁷ We note that the clause in section 274(b)(3)(B), "pursuant to written contracts or tariffs that are filed with the Commission," can be read to require the filing of both contracts and tariffs with the Commission, or only the filing of tariffs. In addition, the phrase "and made publicly available," could refer only to "tariffs" or also to "written contracts." Although the *Accounting Safeguards NPRM* sought comment on section 274(b)(3), no commenters in that proceeding specifically addressed these issues regarding section 274(b)(3)(B).⁵⁵⁸

⁵⁵⁷ 47 U.S.C. § 274(b)(3).

⁵⁵⁸ See *Accounting Safeguards Notice* at ¶ 110.

248. "Filed with the Commission." We seek comment on whether BOCs should be required under section 274(b)(3)(B) to file both written contracts and tariffs on Commission premises. We note that, pursuant to existing practice, BOCs are already required to file tariffs with the Commission.⁵⁵⁹ We also note that section 211 of the Communications Act imposes a general requirement on common carriers to "file with the Commission" copies of "contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of [the Communications Act]" relating to communications traffic.⁵⁶⁰ Our rules implementing this section, however, require only that certain carriers file certain types of contracts with the Commission.⁵⁶¹ As to the remaining contracts within the scope of section 211, carriers are permitted to comply with section 211 by keeping the contracts on their premises such that they are "readily accessible to Commission staff and members of the public upon reasonable request."⁵⁶² We invite parties to comment on whether we can and should adopt these procedures to implement the statutory language in section 274(b)(3)(B).

249. "Made Publicly Available." We tentatively conclude that section 274(b)(3)(B) requires that both written contracts and tariffs be made "publicly available." As noted above, BOCs are already required to make their tariffs and certain written contracts with other carriers publicly available by filing them with the Commission and make others contracts accessible upon reasonable request. We find that interpreting this section to require all contracts, as well as tariffs, to be made "publicly available," is necessary to ensure that BOCs are complying with the nondiscrimination and accounting safeguards of the Act and to enable competitors to detect discrimination and potential improper cost allocations by the BOCs. We seek comment on this tentative conclusion.

250. Assuming that section 274(b)(3)(B) does not require BOCs to file all their written contracts with separated affiliates or electronic publishing joint ventures on Commission premises, we seek comment on the means by which a BOC and its separated affiliate or electronic publishing joint venture must make their contracts "publicly available" pursuant to section 274(b)(3)(B). In interpreting a similar requirement in section 272(b)(5), which requires that BOCs and their section 272 affiliates reduce their transactions to writing and make them available for public inspection,⁵⁶³ we found that a BOC must make information "available for public inspection" pursuant to that section by making it available at

⁵⁵⁹ 47 U.S.C. § 203.

⁵⁶⁰ *Id.* § 211.

⁵⁶¹ *See* 47 C.F.R. § 43.51.

⁵⁶² *Id.* § 43.51(c).

⁵⁶³ *See* 47 U.S.C. § 272(b)(5), providing that a separate affiliate required by section 272 "shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."

its corporate headquarters and not the RBOC corporate headquarters or the corporate headquarters of the BOC's holding company.⁵⁶⁴ We stated that this information must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information System ("ARMIS") reports.⁵⁶⁵ We also concluded that detailed written descriptions of transactions between BOCs and their section 272 affiliates must be made available to the public on the Internet within ten days of the transaction.⁵⁶⁶ We therefore seek comment on whether, for written contracts within section 274(b)(3)(B) that we decide need not be filed on Commission premises, we should interpret the "publicly available" requirement of this section in the same manner as we interpreted the "available for public inspection" requirement in section 272(b)(5).⁵⁶⁷ Commenters disagreeing with this approach should explain why, and propose alternative approaches.

251. Meaning of "Transaction." We also seek comment on what constitutes a "transaction" for purposes of section 274(b)(3).⁵⁶⁸ We note that, for purposes of section 272(b)(5), we concluded that only once the BOC and its affiliate have agreed upon the terms and conditions for telephone exchange and exchange access does the agreement constitute a "transaction."⁵⁶⁹ We also found that an agreement between a BOC and its affiliate for the provision of unbundled elements and facilities pursuant to explicit terms and conditions also constitutes a "transaction."⁵⁷⁰ We seek comment here on whether we should adopt similar conclusions in the context of section 274(b)(3). We note, however, that section 274(d) requires BOCs to provide "network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to rate regulation)." We therefore tentatively conclude that, although section 274(b)(3)(B) provides that transactions must be carried out pursuant to "written contracts or tariffs," the specific transactions described in section 274(d) may only be carried

⁵⁶⁴ *Accounting Safeguards Order* at ¶ 122 n.298.

⁵⁶⁵ See, e.g., *Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies* (Parts 31, 43, 67, and 69 of the FCC's rules), CC Docket No. 86-182, Order, 4 FCC Rcd 1040, 1124. Such certification statement declares that an officer of the BOC has examined the submission and that to the best of the officer's knowledge all statements of fact contained in the submission are true and the submission is an accurate statement of the affairs of the BOC for the relevant period.

⁵⁶⁶ See *Accounting Safeguards Order* at ¶ 122.

⁵⁶⁷ We note that section 272(b)(5) does not make any reference to filings with the Commission.

⁵⁶⁸ No commenters addressed this issue in the *Accounting Safeguards Order*.

⁵⁶⁹ *Accounting Safeguards Order* at ¶ 124.

⁵⁷⁰ *Id.*

out pursuant to tariff (so long as such services are subject to rate regulation). We seek comment on this tentative conclusion.

C. Procedural Matters

1. Ex Parte Presentations

252. This *Further Notice* is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.⁵⁷¹

2. Regulatory Flexibility Certification

253. Section 603 of the Regulatory Flexibility Act, (RFA) as amended,⁵⁷² requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings, unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."⁵⁷³ A "small entity" is an entity that is independently owned and operated; is not dominant in its field of operation; and meets any additional criteria established by the Small Business Administration (SBA).⁵⁷⁴ SBA regulations define small telecommunications entities in SIC code 4813 (Telephone Companies Except Radio Telephone) as entities with fewer than 1,500 employees.⁵⁷⁵ This proceeding pertains to the BOCs which, because they are dominant in their field of operation and have more than 1,500 employees, do not qualify as small entities under the RFA.⁵⁷⁶ We also note that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC), and all of the BOCs or their RHCs have more than 1,500 employees.⁵⁷⁷ We therefore certify, pursuant to section 605(b) of the RFA, that the tentative conclusions, if adopted, will not have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this *Further Notice*, including this certification and statement,

⁵⁷¹ See generally 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

⁵⁷² 5 U.S.C. § 603.

⁵⁷³ *Id.* § 605(b).

⁵⁷⁴ The RFA incorporates the definition of small business concerns set forth in 15 U.S.C. § 632(a)(1). 5 U.S.C. § 601(3).

⁵⁷⁵ 13 C.F.R. § 121.201.

⁵⁷⁶ Federal Communications Commission, CCB, Industry Analysis Division, *Preliminary Domestic Information From Statistics of Communications Common Carriers*, Table 1.1 (July 1996).

⁵⁷⁷ *Id.*

to the Chief Counsel for Advocacy of the Small Business Administration.⁵⁷⁸ A copy of this certification will also be published in the Federal Register.

3. Initial Paperwork Reduction Act of 1995 Analysis

254. This *Further Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the OMB to take this opportunity to comment on the information collections contained in this *Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days from the date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

4. Comment Filing Procedures

255. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 4, 1997, and reply comments on or before April 25, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

256. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also

⁵⁷⁸ 5 U.S.C. § 605(b).

comply with Section 1.49 and all other applicable sections of the Commission's Rules.⁵⁷⁹ We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. Parties may not file more than a total of ten (10) pages of *ex parte* submissions, excluding cover letters. This 10 page limit does not include: (1) written *ex parte* filings made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written materials filed in response to direct requests from Commission staff. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

257. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

258. Written comments by the public on the proposed and/or modified information collections are due April 4, 1997, and reply comments must be submitted not later than April 25, 1997. Written comments must be submitted by the OMB on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C., 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

VIII. ORDERING CLAUSES

259. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 201, 202, 260, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 260, 274, and 303(r), the REPORT AND ORDER IS ADOPTED, and the requirements contained herein will become effective 30 days after publication of a summary

⁵⁷⁹ See 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (e.g., as "i, ii").

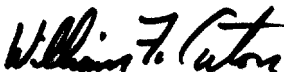
in the Federal Register. The collection of information contained within is contingent upon approval by the OMB.

260. IT IS FURTHER ORDERED that the Secretary shall send a copy of this REPORT AND ORDER, including the final regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

261. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

262. IT IS FURTHER ORDERED that the Secretary shall send a copy of the FURTHER NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

Appendix**List of Commenters in CC Docket No. 96-152**

Alarm Detection Systems, Inc.
Alarm Industry Communications Committee
Alert Holding Group, Inc.
Ameritech
Association of Directory Publishers (ADP)
Association of Teleessaging Services International (ATSI)
AT&T Corporation (AT&T)
Atlas Security Service, Inc.
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Checkpoint Ltd.
Cincinnati Bell Telephone (Cincinnati Bell)
Commercial Instruments & Alarm Systems, Inc.
Commonwealth Security Systems, Inc.
ElectroSecurity Corporation
Entergy Technology Holding Company
George Alarm Company, Inc.
Information Industry Association (IIA)
Joint Parties¹
MCI Telecommunications Corporation (MCI)
Merchant's Alarm Systems
Midwest Alarm
Morse Signal Devices
National Security Service
New York State Department of Public Service (New York Commission)
Newspaper Association of America (NAA)
NYNEX Corporation (NYNEX)
Pacific Telesis Group (PacTel)
Peak Alarm
People of the State of California/California PUC (California Commission)
Per Mar Security Services
Post Alarm Systems
Rodriguez, Francisco
Safe Systems
Safeguard Alarms, Inc.
SBC Communications, Inc. (SBC)

¹ Bell Atlantic and Newspaper Association of America

SDA Security Systems, Inc.
Security Systems by Hammond, Inc.
Sentry Alarm Systems of America, Inc.
Sentry Protective Systems
Smith Alarm Systems
Superior Monitoring Service, Inc.
SVI Systems, Inc.
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)
U S West, Inc. (U S WEST)
Valley Burglar & Fire Alarm Co., Inc.
Vector Security
Voice-Tel
Wayne Alarm Systems
Yellow Pages Publishers Association (YPPA)